IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: EQUIMED, INC.	:	MASTER FILE NO.
SECURITIES LITIGATION	:	98-cv-5374 (NS)
_____	:	
This Document Relates to	:	
ALL ACTIONS	:	
_____	:	CLASS ACTION

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. March 3, 2003

Plaintiff's class counsel petitions for attorney's fees in the amount of $540,000.00 and costs in the amount of $124,184.35, in accordance with a Settlement Agreement approved by the court after hearing on notice to the class (Memorandum and Order dated September 20, 2002 (#212)).

The action, filed in November 1998, alleged the corporate defendant and certain of its officers and directors violated the federal securities laws by issuing a series of false and misleading public statements regarding EquiMed's financial condition. Because of bankruptcy proceedings relating to EquiMed,[1] the court severed and stayed the claims of the lead plaintiff and the proposed class against EquiMed. The individual defendants, Douglas Colkitt,

[1]Initially, certain creditors of EquiMed filed a petition to force EquiMed into involuntary bankruptcy proceedings under Chapter 7 of the Bankruptcy Code, and EquiMed itself filed its own voluntary Chapter 11 petition. Later, both of these proceedings involving EquiMed were converted to a liquidation proceeding under Chapter 7 of the Bankruptcy Code. EquiMed's Chapter 7 liquidation proceeding remains pending. It has been represented to the court by Lead Counsel for the class that the EquiMed Chapter 7 liquidation is not expected to result in any payment to EquiMed's present or former equity holders or to the purchasers of EquiMed common stock.

Jerome Derdel, Raymond J. Caravan, Jr., Larry W. Pearson, Daniel Beckett, Brian D. Smith and Gene Burleson ("Defendants") moved to dismiss the Consolidated Complaint on various grounds, including an alleged failure to plead fraud with the particularity required by applicable law.

On May 9, 2000, the court granted in part and denied in part defendants' Motion to Dismiss the Consolidated Complaint (#51). The court dismissed all claims alleging that defendants had violated the federal securities laws by failing to disclose violations of Medicare and CHAMPUS regulations governing health care providers such as EquiMed. The court sustained the legal sufficiency of those portions of the Consolidated Complaint alleging that certain defendants violated federal securities laws by failing to disclose either the absence of independent directors at EquiMed, the inadequacy of EquiMed's internal accounting controls, or both.

Following the ruling on the Motion to Dismiss the Consolidated Complaint, lead plaintiff filed a Revised Consolidated Amended Class Action Complaint on May 30, 2000 (the "Complaint") (#52). Defendants answered the Complaint denying all material allegations and denying any liability to the lead plaintiff or the proposed class (#55).

The court then certified this action as a class action on behalf of the following class (the "Class"):

> All persons who purchased common stock of EquiMed on the NASDAQ market during the period of June 10, 1997 through June 22, 1998 and who held shares on June 22, 1998 and were damaged thereby, except the defendants herein; members of the individual defendants' immediate families; any parent, subsidiary, affiliate, officer, or director or EquiMed; any entity in which any excluded person has a controlling interest; and the legal representatives, heirs, successors and assigns of any excluded person. (#69)

Prior to the court's decision on the Motion to Dismiss, discovery on the merits of the action was stayed under applicable law. Following the decision on the Motion to Dismiss, lead counsel conducted extensive fact finding and document discovery from the parties, certain non-party witnesses, EquiMed, and EquiMed's Bankruptcy Trustee. In addition, each of the defendants in the action was examined under oath, as were certain other persons believed to have relevant information concerning the allegations of the Complaint.

Following the conclusion of discovery, all defendants, moving for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (#150), contended that the evidence gathered by lead counsel was not sufficient to create a jury issue whether defendants violated the federal securities laws as alleged in the Complaint. Lead counsel, opposing the summary judgment motions in papers and at oral argument on February 14, 2002, contended that the evidence marshaled by lead counsel was more than adequate to support a jury verdict and judgment in favor of the lead plaintiff

and the Class against all defendants. At the time settlement was reached, defendants' motions for summary judgment had been fully briefed and argued and were awaiting decision by the court.

While summary judgment and expert disqualification motions were pending, and with a trial date imminent, lead plaintiff and defendants agreed to participate in private mediation. Retired U.S. District Judge Nicholas H. Politan conducted a mediation which resulted in an agreement in principle to settle the action for $1,800,000. The settlement was embodied in a Stipulation providing for the settlement of the action and an award of attorney's fees not to exceed thirty percent (30%) of the gross settlement fund, i.e., $540,000, and reimbursement of costs, subject to approval by the court.

In addition, lead counsel was permitted to apply to the court for a compensatory award to plaintiffs in the amount of $10,000 in consideration of costs and expenses (including lost wages) directly relating to the representation of the class by the lead plaintiff. This award was denied at the class action settlement hearing because plaintiff provided no evidence of any costs and expenses or lost wages directly relating to representation of the class. Any bonus or preference to lead counsel over other members of the class is inconsistent with the Private Securities Litigation Reform Act and a violation of Fed. R. Civ. P. § 23.1.

The Stipulation of Settlement, while providing that it is cancelled and terminated if not approved by the court, or materially modified or reversed on appeal, expressly excludes the fee and expense award: "Neither a modification nor reversal on appeal of the Fee and Expense Award shall be deemed a material modification of the Judgment or of this Stipulation." Par. G.1.

To determine appropriate attorney's fees, the court calculates a "lodestar:" the reasonable hourly rate multiplied by the number of hours reasonably expended on successful claims. Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., 487 F.2d 161, 167-68 (3d Cir. 1973) ("Lindy I"); see also Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (en banc) ("Lindy II"). Plaintiff must submit verified itemization of the hours worked at the rate claimed. Id. At 433. The defendant, if opposing the fee award, has the burden of challenging the reasonableness of the requested fee. See Rode, 892 F.2d at 1183.

Hourly rates must be "in line with those prevailing in the community for similar service by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, 465 U.S. 886, 896 n. 11 (1984). See also Smith v. Philadelphia Housing Auth., 107 F.3d 223, 225 (3d Cir. 1997). The prevailing market rate is usually deemed reasonable. See Public Interest Research Group v.

Windall, 51 F.3d 1179, 1185 (3d Cir. 1995). A reasonable rate is one which will attract adequate counsel but will not produce a windfall to the attorney. Id.

Hours Reasonably Expended

Excessive, redundant, or otherwise unnecessary hours should be excluded from the fees awarded. Hensley, 461 U.S. at 434. Where a plaintiff does not prevail on a claim distinct from his successful claim, the hours spent on the unsuccessful claim should not be included in the lodestar calculation. Id. At 434.

The lodestar calculation does not complete the fee inquiry. Other considerations may lead the court to adjust the fee upward or downward. See Hensley, 461 U.S. at 434.

A court may consider the relief awarded as compared to that requested as one measure of how successful the plaintiff was. See Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1042 (3d Cir. 1996). This success, or lack thereof, may be taken into consideration when awarding fees. Id.

Plaintiffs first filed their Motion for Attorney's Fees and Costs related to the settlement on August 28, 2000 (#204). Plaintiffs asked the court to compensate them by considering their current hourly rates rather than the rates charged at the time the services were performed. The claimed "lodestar" in the initial petition was $992,663.25; costs claimed were $126,942.74.

In awarding the prevailing party attorney's fees in a federal action, the court has discretion to consider counsel's current hourly rate or to consider the historical date with a delay multiplier. See Keenan v. City of Philadelphia, 983 F.2d 459 (3d Cir. 1992). Pretrial Order No. 1 required plaintiff's counsel to keep contemporary time records and submit them to lead counsel on a monthly basis; lead counsel was then required to submit them to the court under seal with a certification that the fees were reasonable and necessary for the benefit of the class. This regulation of requested fees would be ineffective, if not meaningless, unless fees were awarded on a historical rather than current basis. Accordingly, lead counsel was required to submit a fee petition on a historical basis consistent with the previous submissions under seal.

The court accepts lead counsel's certification of the hours expended and the reasonableness of the historical hourly rates. The revised petition now before the court, filed November 1, 2002 (#219) reports a lodestar totaling $846,042.25, but the amount of the award requested is $540,000, consistent with the cap on attorney's fees in the Stipulation of Settlement. The fees requested total 30 per cent of the settlement amount. A request for fees less than the lodestar would ordinarily be routinely awarded, but we are also required to adjust the lodestar by the

results obtained. Here, many of plaintiff's initial claims failed to survive a Motion to Dismiss.

The bankruptcy of the corporate defendant limited recovery to insurance available for liability of the individual defendants only. Counsel's effort to obtain the bulk of that insurance for the benefit of the class was persistent and effective and produced the only sums available for settlement. Nevertheless, the resulting settlement fund, while the best that could be obtained, was far less than the sum originally claimed.

Plaintiffs originally brought this action alleging: (1) misstatements or omissions based on alleged Medicare and CHAMPUS fraud; (2) non-disclosure of inadequate accounting methods; and (3) lack of independence of certain directors. The court: (1) dismissed the claims of misstatements or omissions based on alleged Medicare and CHAMPUS fraud on both counts; (2) dismissed the claim of non-disclosure of inadequate accounting methods as to the other six individual defendants; (3) dismissed the claim concerning the lack of independence of certain directors as to four individual defendants; and denied the motion to dismiss as to three individual defendants only.

Where a plaintiff class does not prevail on a claim distinct from the successful claim, the hours spent on the unsuccessful claim should not be included in any lodestar calculation. In those

circumstances, the court is justified in making a downward departure from the fees sought by counsel.

This is especially true when the revised request for expenses in the amount of $124,184.35 is considered. A reasonable award of expenses in addition to attorney's fees is not objectionable, but in this class action where it was agreed the attorney's fees would be no more than 30 percent of a very limited recovery, the initial request was for reimbursement of $126,942.74 in expenses, equal to 24% per cent of the fee award requested. Even when the petition for expenses was revised to exclude costs customarily included in the generous hourly fees (such as local telephone charges and postage), the amount claimed was $124,184.35 or 23% percent of the fee award, a sum clearly excessive in view of the limited recovery obtained for the class. Because the documentation of expenses supplied to the court was inadequate, we cannot be sure how much expense was incurred after the lack of defendants' resources was known, but in the circumstances, it was an obligation of lead counsel to exercise greater control of costs, an obligation that should have been taken more seriously in assigning so many other law firms to assist lead counsel. The statutory scheme for appointment of lead counsel in the Private Securities Litigation Reform Act does not contemplate the proliferation of counsel with concomitant fees and expenses to the detriment of the amount available for distribution to the class.

The court is of the view that the total amount of attorney's fees and expenses to be awarded should be no more than one-third (33 1/3%) of the gross settlement sum, or $600,000.00. Therefore, the court will award attorney's fees in the total amount of $475,815.65 and costs in the total amount of $124,184.35.

An appropriate order follows.

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ORDER

AND NOW, this 3rd day of March, 2003, upon consideration of class counsel's petition for attorney's fees and costs (#204), as provided for by Settlement Agreement approved by the court (#212), attorney's fees and costs are awarded as follows:

	Attorney's Fees	Costs	Total Distribution
Stull, Stull & Brody	$337,628.75	$99,136.18	$436,764.93
Bernard M. Gross, P.C.	$ 76,266.60	$ 8,031.45	$ 84,298.05
Savett Frutkin Podell & Ryan, P.C.	$ 10,368.72	$ 4,062.03	$ 14,430.75
Schiffrin & Barroway, LLP	$ 26,332.78	$ 7,038.18	$ 33,370.96
Milberg Weiss Bershad			

Hynes & Lerach, LLP	$ 1,398.27	$ 1,376.80	$ 2,775.07
Abbey Gardy	$ 23,820.53	$ 4,539.71	$ 28,360.24
Totals	$475,815.65	$124,184.35	$600,000.00

BY THE COURT:

_____

S.J.